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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1957

No. [redacted] 584 MISC.

JOHN P. KINSEY, individually, and as a director and stockholder of Monroe Paper Products Company, and LAWRENCE G. KUNKEL and THE WATERBURY CORRUGATED CONTAINER CO., individually and as stockholders of said Monroe Paper Products Company,

Petitioners,

v.

HONORABLE CHARLES C. SIMONS, CHIEF JUDGE, and HONORABLE SHACKELFORD MILLER, JR., and HONORABLE FLORENCE E. ALLEN, JUDGES, OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT,

Respondents.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS
AND
PETITION FOR WRIT OF MANDAMUS

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IN THE

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JOHN P. KINSEY, individually, and as a director and stockholder of Monroe Paper Products Company, and LAWRENCE G. KUNKEL and THE WATERBURY CORRUGATED CONTAINER CO., individually and as stockholders of said Monroe Paper Products Company,

Petitioners,

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HONORABLE CHARLES C. SIMONS, CHIEF JUDGE, and HONORABLE SHACKELFORD MILLER, JR., and HONORABLE FLORENCE E. ALLEN, JUDGES, OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT,

Respondents.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS

The Petitioners move the Court for leave to file the annexed Petition for Writ of Mandamus under 28 United

States Code. § 1651(a). directed to the above named Respondents.

John P. Kinsey
Lawrence G. Kunkel
The Waterbury Corrugated
Container Co.
Petitioners

By GEORGE E. BRAND,
Their Attorney

GEORGE E. BRAND,
Attorney for Petitioners,
3709-23 Cadillac Tower,
Detroit 26, Michigan.

GEORGE E. BRAND, Jr.,
Of Counsel.

Dated February 27, 1958.

IN THE

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JOHN P. KINSEY, individually, and as a director and stockholder of Monroe Paper Products Company, and LAWRENCE G. KUNKEL and THE WATERBURY CORRUGATED CONTAINER CO., individually and as stockholders of said Monroe Paper Products Company,

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Respondents.

PETITION FOR WRIT OF MANDAMUS[1]

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Opinions in Courts Below

First Appeal

Kinsey et al v. Knapp et al (DC ED Mich., August 4, 1955), Lederle, Chief Judge. Not reported. Printed

[1] This petition is complementary to Petitioners' Petition for Writ of Certiorari filed simultaneously herewith and to which reference will be made herein, The certified record and appellate court appendices certified in connection with said petition for certiorari are also relied upon in support of this petition for mandamus.

in Petitioners' Appendix to petitioners' petition for certiorari, pages 2-116.

Knapp et al v. Kinsey et al (CA 6, May 1, 1956). Reported in 232 F 2d 458. Printed in Petitioners' Appendix to petitioners' petition for certiorari, pages 117-132.

Knapp et al v. Kinsey et al (CA 6, July 19, 1956). Reported in 235 F 2d 129. Printed in Petitioners' Appendix to petitioners' petition for certiorari, pages 133-135. Certiorari, only as to taxation of costs, denied, 353 US 892, 77 S Ct 131, 1 L ed 2d 86.

Second Appeal

Kinsey et al v. Knapp et al (DC ED Mich., July 30, 1957), Picard, District Judge. Reported in 154 F Supp 263. Printed in Petitioners' Appendix to petitioners' petition for certiorai, pages 136-148.

Knapp et al v. Kinsey et al, and *Kinsey et al v. Knapp et al* (CA 6, December 6, 1957). Reported in 249 F 2d 797. Printed in Petitioners' Appendix to petitioners' petition for certiorari, pages 149-161.

Knapp et al v. Kinsey et al and *Kinsey et al v. Knapp et al* (CA 6, January 31, 1958). Denial of rehearing. No opinion.

Statement as to Jurisdiction

The date, and the date of entry, of the judgment affected by this petition is December 6, 1957. The date, and the date of entry, of the order denying rehearing as to said judgment is January 31, 1958.

The statute believed to confer jurisdiction to issue writ of mandamus in the exercise of this Court's power of supervision pursuant to Supreme Court Rules 30 and 31(1) and (3) is 28 USC § 1651(a).

Questions Presented[2]

I If certiorari is not granted, should not this Court grant this petition for writ of mandamus?

II Where the validity of a five-year voting trust, fundamental to the further conduct of pending litigation and to the operations of the affected corporation, has been actively litigated before the federal courts for more than four years, has twice been held invalid by the District Court for violations of federal and state statutes and the trust will expire in less than one year, shall this Court's jurisdiction to review the validity of said trust be defeated or postponed and shall the invalidity of the trust become moot by reason of a second refusal of the Court of Appeals to pass upon the merits of the second partial final judgment?

III Should the appellate power of this Court in respect of a partial final summary judgment determining that a voting trust agreement was invalid and unenforceable because the respondent voting trustees failed to register the voting trust certificates under The Securities Act of 1933 and under the Michigan Blue Sky Law, be defeated by the refusal of the Court of Appeals, on appeals from the judgment,[3] to pass upon the validity of the trust agreement and of the issuance of the voting trust certificates, and by its direction that all claims and counterclaims asserted in the litigation be first "heard and considered as a unit" by the District Court?

IV Did the Court of Appeals by its refusal to pass upon or determine the issues of law presented by petitioners' motion for partial summary judgment and by its direction of unit trial of all issues in the action, deny petitioners the due process of law and the equal protection of the law guaranteed to petitioners by the Fourteenth Amendment

[2] For Questions Presented On Petitioners' Petition for Writ of Certiorari, see pages 3-7 thereof.

[3] *Knapp et al v. Kinsey et al*, and *Kinsey et al v. Knapp et al*, 249 F 2d 797, printed in Petitioners' Appendix to Petition for Writ of Certiorari, pages 149-161.

to the Constitution of the United States, in view of the facts that—

(a) The validity and enforceability of the voting trust agreement, which will expire December 30, 1958, has been actively litigated in the federal courts by petitioners for almost four years and by partial final District Court judgments the agreement has twice been held to be invalid because of the failure of the respondent trustees to register the voting trust certificates issued under the agreement as required by the federal Securities Act of 1933 and the Michigan Blue Sky Law.[4]

(b) The Court of Appeals' decision directing that the case should be "heard and considered as a unit" and directing full trial thereof in the District Court means that all phases of petitioners' claims derivatively asserted against the respondent corporate officers and directors, and all claims asserted by petitioners in their own behalf against respondents individually and as fiduciaries, including petitioners' claim for multiple damages as to which respondents seek jury trial, and the counterclaim of the respondent directors against petitioners, must be heard and determined before the dispositive legal questions as to the validity of the voting trust agreement may be reviewed or determined.

(c) Appellate review and determination of the issues of law presented by petitioners' motion for partial summary judgment and of the issues of law determined by the judgment are fundamental to the further conduct of the case and to the operation and management of the affairs of the corporation and to the rights of the stockholders for whose benefit the derivative portion of petitioners' action was brought.

(d) Due to the unresolved question as to the validity of the voting trust agreement, no meeting of the stockholders of the corporation has been held since

[4] The first judgment was reversed in *Knapp et al v. Kinsey et al* (CA 6), 232 F 2d 458, because of bias of the District Judge. Retrial before another judge was directed.

September 1953 with the result that the respondents (being all of the officers and a majority of the directors of the company and also the sole trustees under the trust agreement) have not only remained in control of the corporation to date, but will remain in such control until the directed unit trial is had and all issues are determined. The voting trust will, or is almost sure to, expire before such determination can thus finally be made and important questions as to the right of respondents as fiduciaries of the company and of its stockholders, including petitioners, to occupy conflicting positions of trust will, to a prejudicial extent, become moot.

V. When, pursuant to Rule 56(a), (c), (d) and Rule 54(b), Federal Rules of Civil Procedure, the District Judge entered a partial final summary judgment determining that the voting trust agreement was invalid because of respondent trustees' failure to register the voting trust certificates under The Securities Act of 1933 and the Michigan Blue Sky Law, and petitioners claimed that the District Judge also should have held that, as a matter of law, the trust agreement was invalid because it violated the fiduciary duties and obligations of the respondent corporate officers and directors and also the federal and state statutes proscribing restraints of trade and price fixing and state statute and public policy as to restraints on alienation of property, should not the Respondent Judges have reviewed all of these questions?

VI Do the mere allegations of an undetermined counterclaim of the respondents, as individual stockholders and corporate officers and directors *but not as the voting trustees*, justify the refusal of the Court of Appeals to pass upon the questions of law determinative of the validity of the trust agreement, especially in view of the facts that:

(a) The District Judge expressly determined, pursuant to the discretion vested in him by said Rule 54(b), that there was no just reason for delay and that partial final judgment should be entered determining the invalidity of the trust agreement and directing the holding of the long deferred stockholders meeting.

(b) The counterclaim was against petitioners only and not the corporation or its stockholders generally, did not involve the validity of the voting trust, and did not contest the fact that petitioner Kinsey was a director and stockholder and that the other petitioners were stockholders at the time they filed their derivative action on February 2, 1954 attacking the validity of the voting trust agreement because of violation of fiduciary duties and federal and state laws.

VII Is the exercise of the discretion of the District Judge to grant a partial judgment under said Rule 54(b) reversible by the Court of Appeals except for an abuse of judicial discretion?

Statutes and Rules Involved[5]

Federal Rules of Civil Procedure

Rules 1, 52(a), 54(b) and 56(a),(c),(e)—as to speedy trial, findings by court, judgment upon multiple claims, and summary judgment.

United States Code

15 USC §§ 1, 2, 15, 26—as to trusts and restraint of trade.

15 USC §§ 77b, d-g, j, q, x; §§ 78j, 78bb, 78cc— The Securities Act of 1933 and The Securities Exchange Act of 1934.

Rule of Securities and Exchange Commission

Rule X-10 B-5, as to use of mails etc., to defraud.

Compiled Laws Michigan 1948 and Michigan Statutes Annotated

§§445.701(5), 445.708, 445.711, 750.558 (§§ 28.31(5), 28.36, 28.38, 28.826 MSA), as to restraint of trade and price fixing.

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[5] These statutes and rules are indexed in Petitioners' Petition for Writ of Certiorari at pages 8-11, and excerpts thereof are printed in Petitioners' Appendix to said petition for certiorari at pages 8-11.....

§ 451.102, as amended, §§ 451.103, 451.106, 451.107, 451.120, 451.133, (§§ 19.742-19.743, 19.746-19.747, 19.760, 19.773 MSA), Michigan Blue Sky Law.

§§ 641.3, 641.5 (§§ 27.2393, 27.2395 MSA)—as to derivative actions and right of a director and stockholder to sue.

§ 450.34 (§ 21.34 MSA)—as to voting trusts.

§ 554.51(1) (§ 26.49(1) MSA)—as to restraints on alienation of property.

STATEMENT OF THE CASE

The statements of jurisdiction of the District Court and of the facts, appearing on pages 12-29 of petitioners' petition for certiorari are adopted by reference.

ARGUMENT

Reasons for Allowance of Writ[6]

1. Under the circumstances the decision of the Court of Appeals directing unit trial of all issues in the action and refusing to determine the questions of law presented by the appeals from the partial judgment constitutes a denial of judicial process, contrary to the Constitution of the United States.

II. The Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

III. The Court of Appeals has, without justification and with most serious resultant detriment to petitioners, the corporation and its stockholders generally, failed to accomplish the objectives of the Federal Rules of Civil Procedure, i.e.: to secure the just, speedy, and inexpensive determination of every action (Rule 1), to permit final and reviewable partial judgments in multiple claims actions (Rule 54(b), and summary judgments upon a claim, irrespective of the pendency of a counterclaim (Rule 56(a)(d), and has failed to determine questions of law fundamental to the further conduct of the case.

IV The appeals of petitioners, directors and stockholders, to procure federal court decision as to the validity of the voting trust were commenced *before* the solicitation for the trust was completed or effective to place the trust in operation and while the violations of federal and civil laws were still being carried on. These efforts have been diligently prosecuted for four yars. On two occasions two District Judges have determined that partial final judg-

[6]Reasons I-III are the same as Reasons I-III set forth in the petition for certiorari page 30 thereof.

ment should be entered holding the trust invalid, compelling return of the deposited stock and permitting the holding of a stockholders meeting, none having been held since 1953. On the occasion of each of the two appeals the Court of Appeals stayed the judgment but refused to pass upon the legal questions decided by the District Judges. It has now directed that the case be "heard and considered as a unit." This will include claims of invalidity of the trust, twice decided, claims of other breaches of fiduciary duly and mismanagment, claims growing out of wrongful diversion of corporate business opportunities, claims for accounting, multiple damages and counterclaims. The trust will expire December 30, 1958 and the inevitable effect of the second remand and direction will be that if the unit case must be tried, no appellate review, especially by this Court, as to the validity and enforceability of the trust can be had before the trust will expire and its validity will become moot as to many of the issues. Meanwhile, for the entire life of the trust the offending officers-directors will have enjoyed the possession of the majority of the corporate stock and control of the corporation and of its affairs as was the purpose of the trust agreement. The refusal of the appellate court to pass upon the legal sufficiency of a judgment inimical to the trust appears to be a denial of due process of law and of the equal protection of law guaranteed by the federal constitution.

If this Court does not grant certiorari, we respectfully submit that, under the unusual circumstances, protection of the rights of the corporation, its stockholders generally, and of petitioners against whom the trust was directed, justifies this Court in issuing appropriate mandamus.

If certiorari is granted, mandamus will be unnecessary. We do add that in *Barr v. Matteo*, 355 US....., 78 S Ct ....., 2 L ed 179, this Court granted certiorari and remanded the case to the Court of Appeals to consider a question of qualified privilege which that court had declined to pass upon. However, no petition for mandamus was filed and there was no danger that important questions

of law would become moot if speedy review by this Court was not accorded.

In principle, the situation does not differ from that reported in *Williams v. Simons*, 355 US ....., 78 S Ct ....., 2 L ed 2d 87 in which, due to the failure of the lower court to decide a controversy until after a public officer had enjoyed the balance of his term and the points involved had become moot, this Court was prevented from exercising its appellate power. See, also, *Moog Industries, Inc. v. Federal Trade Commission*, 355 US . 78 S Ct . 2 L ed 2d 370.

Remedy of Mandamus

The All-Writs statute, 28 USC § 1651(a) unquestionably gives this Court the power to issue the writ of mandamus.

Ex Parte Republic of Peru, 318 US 578, 63 S Ct 793, 87 L ed 1014, 1017; speaking of writs of prohibition and mandamus:

> "The writs thus afford an expeditious and effective means of confining the inferior court to a lawful exercise of its prescribed jurisdiction, *or of compelling it to exercise its authority when it is its duty to do so.*" (Italics added)

McCullough v. Cosgrove, 309 US 634, 60 S Ct 703, 84 L ed 992, directing the district judge to vacate an order referring the cause to a master and to proceed to trial without postponement to trial of other cases not entitled to preference.

Ex Parte United States, 287 US 241, 53 S Ct 129, 77 L ed 283, in which mandamus was granted to compel the District Court to conform to an equity rule.

The questions presented by the record as to the validity of the voting trust were and are forthright questions of law, the determination of which nowise depended or depends upon any of the questions raised by the retaliatory counterclaim filed by the defendant officers-directors, but not by them as trustees under the voting trust agreement.

As to discussion of said questions of law we refer to the petition for certiorari, pages 34-49, under the subheading Partial Judgment, Restraint of Trade - Price Fixing - Public Policy - Restraints on Alienation, Fiduciary Duties, Public Offering, Misrepresentations, Right to Sue, and Review of Partial Judgment.

Conclusion

For the reasons hereinbefore set forth, which disclose the gravity of the situation resulting from the refusal of the respondent Judges to give timely decision on the legal questions determinative of the validity, invalidity and enforceability of the voting trust agreement and leaving the District Judge, on the retrial, without appellate guidance as to such questions, it is respectfully submitted that, if this Court does not grant petitioners' petition for certiorari, this petition for writ of mandamus should be granted and that said writ should direct appellate decision, by the respondent Judges, of the following questions of law:

(a) Did the voting trust agreement violate the fiduciary duties and obligations of the defendant officers-directors to the corporation, its stockholders generally, and to petitioners?

(b) Did it violate the state and federal laws proscribing price-fixing and restraint of trade, and the Michigan law as to restraint on alienation of property?

(c) Were the issuance and delivery of the voting trust certificates in violation of the federal and state laws in respect of securities, and

(d) Were petitioners entitled to the summary judgment for which they moved;

unaffected by the counterclaim of the defendant officers-directors

or

in any event, this Court should direct appellate decision, by the respondent Judges, of all of the questions of law presented by the appeal and cross appeal.

Petitioners pray for such other relief as may be proper.

John P. Kinsey
Lawrence G. Kunkel
The Waterbury Corrugated
Container Co.
Petitioners

By GEORGE E. BRAND,
Their Attorney

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Detroit 26, Michigan.

GEORGE E. BRAND, Jr.,
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Dated February 27, 1958.

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Respondents.

BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS

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Counter-Statement as to Opinions Below

See also Appeal of *U. S. Securities & Exchange Commission* (C.A. 6, 1955) 226 F 2d 501; nine copies filed in connection with our brief in opposition to certiorari application No. 837.

Counter-Statement of the Case

The petitioners (plaintiffs below) had moved for a summary judgment, assigning numerous grounds and various theories. They were met by defenses both of fact and of law. As to most of the motion, the District Judge found that there were genuine issues as to material facts, and he refused summary judgment, reserving the issues for

trial. The Court of Appeals finds no error and remands the case so that trial can be had.

On part of their motion the petitioners prevailed and recovered a partial summary judgment. The Court of Appeals finds error in that the lower court overlooked genuine issues as to material facts and remands the case for trial. The Court of Appeals further comments that the issues are so interwoven that the case is not suitable for partial summary judgment procedure and should be tried on the merits as a unit.

Petitioners now move this court for leave to file a petition for a writ of mandamus to compel the Court of Appeals to state how it would have decided various legal questions had the disputed facts been resolved according to petitioners' contentions.

We state our contentions as to the facts (with record citations) in our brief in opposition to the companion certiorari application (No. 837).

Counter-Statement of Questions Presented

If there has been error below, will not the certiorari application (No. 837) afford the petitioners adequate relief? And what should the Court of Appeals have done other than what it did do?

ARGUMENT

Mandamus is not a proper remedy when some other appellate remedy is available:

Ex parte Fahey (1946) 332 U.S. 258;
Ex parte Baldwin (1933) 291 U.S. 610.

Mandamus is not a proper remedy to correct legal error:

Parr v. United States (1955) 351 U.S. 513;
Bankers Life and Casualty Company v. Holland (1953) 346 U.S. 379;
Interstate Commerce Commission v. United States (1932) 289 U.S. 385;
In re Park & Tilford (1917) 245 U.S. 82;
Ex part First National Bank of Dexter (1912) 228 U.S. 516.

Petitioners seem to concede (p. 11 of the petition) that if they can have certiorari they need nothing more.

The petition for mandamus inaccurately and very unfairly leaves the impression that some lower court has prevented petitioners from proceeding to trial; and they cite *Williams v. Simons* (1957) 355 U.S. , 2 L. Ed. (2d) 87 where a District Court restraining order was supposed to have delayed a trial in the state court. No such thing has occurred here. Petitioners tried the case, obtained a judgment, lost it because of errors of the court and of counsel (*Knapp v. Kinsey* [C.A. 6, 1956] 232 F 2d 458) and on May 1, 1958 the case stood ready for trial a second time.

Instead of proceeding to trial, the petitioners have consumed two entire years with a motion by them for rehearing (denied 235 F 2d 129), their former certiorari application (denied 353 U.S. 802), their extremely long requests for admissions of fact (19b-130b, 131b-201b), their new amended complaint (19a-97a), and their motion for partial summary judgment (165a-173a) which was granted July 30, 1957 (154 F. Supp. 263), argued on appeal October 21, 1957 and reversed December 6, 1957 (249 F 2d 797). The District Court thereupon set the case down to be tried on February 18, 1958 and had petitioners been willing the trial would have been completed by now. Instead

there has been another petitioners' motion for rehearing (denied January 31, 1958), another petitioners' certiorari application (No. 837 now pending) and a stay of proceedings pending the application, which stay was granted by the Court of Appeals on petitioners' application. Should certiorari be allowed or an order to show cause made on the mandamus petition, the trial will be delayed further.

The petitioners are correct in saying that there has been a great deal of delay, but they are wrong in blaming anyone except themselves.

On page 13 of the petition it is proposed that the Court of Appeals be commanded to answer four questions, the first two of which are as follows:

> (a) Did the voting trust agreement violate the fiduciary duties and obligations of the defendant officers-directors to the corporation, its stockholders generally, and to petitioners?
>
> (b) Did it violate the state and federal laws proscribing price-fixing and restraint of trade, and the Michigan law as to restraint on alienation of property?

These are questions that the District Court had declared itself unable to pass on in the absence of evidence (petitioners' appendix 139-143; *Kinsey v. Knapp* [E.D. Mich. 1957] 154 F.S. 263 at 265-268). Technically the Court of Appeals could do nothing here since the District Court's refusal to enter a summary judgment based on these issues is not a final and appealable order. *John Hancock Mutual Life Insurance Company v. Kraft* (C.A. 2, 1953) 201 F 2d 952; *McGrath v. Hunt* (C.A. 2, 1952), 194 F 2d 529; *Morgenstern Chemical Co. v. Schering Corporation* (C.A. 2, 1950) 181 F 2d 160; *Jones v. St. Paul Fire & Marine Insurance Company* (C.A. 5, 1939) 108 F 2d 123. Passing the question of finality, the disputed fact questions are pointed out and discussed in both lower courts' opinions (154 F Supp. 263 and 249 F 2d 797) and the record fully agrees.

The third question claimed to be unanswered (petition, page 13) is

> (c) Were the issuance and delivery of the voting trust certificates in violation of the federal and state laws in respect of securities?

In the context of this case this involves (among other things) deciding whether certain transactions within a closed group amounted to a public offering of securities, the controlling facts being disputed. The Court of Appeals has ordered the evidence heard and has remanded the case so that an adequate record can be made and brought up to it. Its opinion fully discloses that it should have done nothing else unless it was willing both to act as a court of first instance and to try the case on affidavits.

The final so-called unanswered question (petition, page 13) is

> (d) Were petitioners entitled to the summary judgment for which they moved?

which has of course been specifically and emphatically answered in the negative by the Court of Appeals.

For our detailed version of the facts and particularly the time-table indicating who is responsible for the delay complained of, see our brief in opposition to the certiorari petition (No. 837) filed herewith. We urge that leave to file the petition for mandamus be denied.

Dated: Detroit, Michigan, March 31, 1958.

Respectfully submitted,

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